



Employee Relations & Workers' Compensation

PRESENTED BY:

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Objectives

- Discuss a claim scenario.
- Review basic requirements for a FECA claim to understand key issues in a challenge.
- Recognize some areas where Employee Relations and FECA issues intersect.
- Review selected MSPB and ECAB decisions that can impact both areas.
- Discuss “need to know” and Privacy issues.

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The Case:

- Employee received a “Notice of Decision to Remove” (Tested positive for cocaine use) – May 11, 2005
- Decision held in abeyance in lieu of Last Chance Agreement (LCA).
- Unannounced Urine Analysis (UA) conducted – Jan 3, 2006
- Medical Review Office (MRO) – leaves message for employee on Jan 6 at home and, Jan 7 at work requesting he contact MRO – (same contact process used in May 2005)
- Saturday, Jan 8 – Employee calls supervisor and says he’s tested positive again

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The Case Cont'd:

- Monday, Jan 10 – Employee arrives at work early – found lying on floor complaining loudly about leg.
- Tuesday, Jan 11- Employee no-show for work. Contacts Admin inquiring about injury claim forms
- Jan 13 – Employee notifies supervisor that he was injured on Jan. 10
- Jan 13 – MRO officially notifies agency that employee is positive for cocaine
- Jan 14 – Employee submits CA-1 to Supervisor
- Jan 20 – Medical arrives indicating severe ankle sprain.

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Issues to Consider:

- Last Chance Agreement (LCA)
- Fact of Injury
- Witness Statements
- Bargaining Unit (Union Representation)
- Players Involved
- OWCP Adjudication

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Last Chance Agreement

- A settlement agreement in which the agency agrees to forego a planned adverse action in return for the employee's agreement to meet certain conduct or performance requirements. (e.g., ceasing all use of illegal drug use).
- In most cases, the employee also agrees to forego any right to appeal to the MSPB any subsequent adverse action based on his failure to comply with the terms of the agreement.

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FECA Basics

- Statutory Time Requirements Have Been Satisfied.
- The Injured or Deceased Party Was a Federal Employee.
- The Fact of the Injury.
- The Injury Occurred in the Performance of Duty.
- The Disability or Death was Caused by the Injury Claimed.

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Fact of Injury

Medical Condition. Whether the accident or employment factor resulted in an injury or disease;

- This is determined on the basis of the attending physician's statement that a medical condition is present which may be related to the incident.
- A reasoned or rationalized medical opinion based on an inaccurate or incomplete medical and factual background has little or no probative value or weight.

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- CA-1 traumatic injury claim – extensive medical may not be required:
 - In clear-cut traumatic injury claims, where the fact of injury is established and is clearly competent to cause the condition described, the physician's statement of diagnosis and affirmative statement that it was work-related is sufficient.

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- CA-2 occupational disease cases - claim is not based upon a specific incident
- Claimant must also submit sufficient evidence to identify fully the particular work conditions alleged to have caused the disease and show that the employee was exposed to the conditions claimed.

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- The Claims Examiner will consider:
 - Is the physician a specialist in the appropriate field?
 - Is the physician's opinion based upon a complete and accurate medical and factual history?
 - What are the nature and extent of findings on examination?
 - Is the physician's opinion rationalized?
 - Is the opinion speculative or equivocal?
 - Is the physician's opinion consistent with physical findings.

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- Fact of Injury
 - Did the employee actually experience the accident, event or employment factor which is alleged to have occurred?
 - *Mechanism of Injury* - Employee claims that while he was driving the Self Propelled Vehicle (SPV), it jerked forward and his foot slipped propelling him to the floor.

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Who are the Players?

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Supervisor (responsible for the accuracy of the CA-1)

- Contacts ER concerning (LCA Violation)
- Confers with Mgmt
- Accepts CA-1 and enters in EDI
- Gathers facts concerning injury
- Request accident report from Safety Officer
- Sends hard copy to CA-1 to ICPA (notifies ICPA of LCA)

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Union

- Advises employee of rights
- Provides representation during investigation conducted by agency

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Weingarten Right (Title 5, USC, Sec 114(a)(2)(b) Bargaining unit employees have a statutory right to union representation in:

- Interview/questioning
- In connection with an investigation
- Employee reasonably believes interview will result in discipline
- Employee requests representation

*Ask Labor Relations to check collective bargaining agreement for further rights

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Witness Statements

Bargaining Unit (Union Representation):

Discipline - A right reserved to management that the Federal Labor Relations Authority (FLRA) has said includes the right "to investigate to determine whether discipline is justified." It also "encompasses the use of the evidence obtained during the investigation."

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ICPA

- Examines facts of the claim (includes medical)
- Reviews Witness Statements
- Confers with ER (supervisor knew about LCA)
- Ensures receipt of Accident Report
- Controverts and Challenges Claim (with help of DoD Liaison)

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Filing the Claim

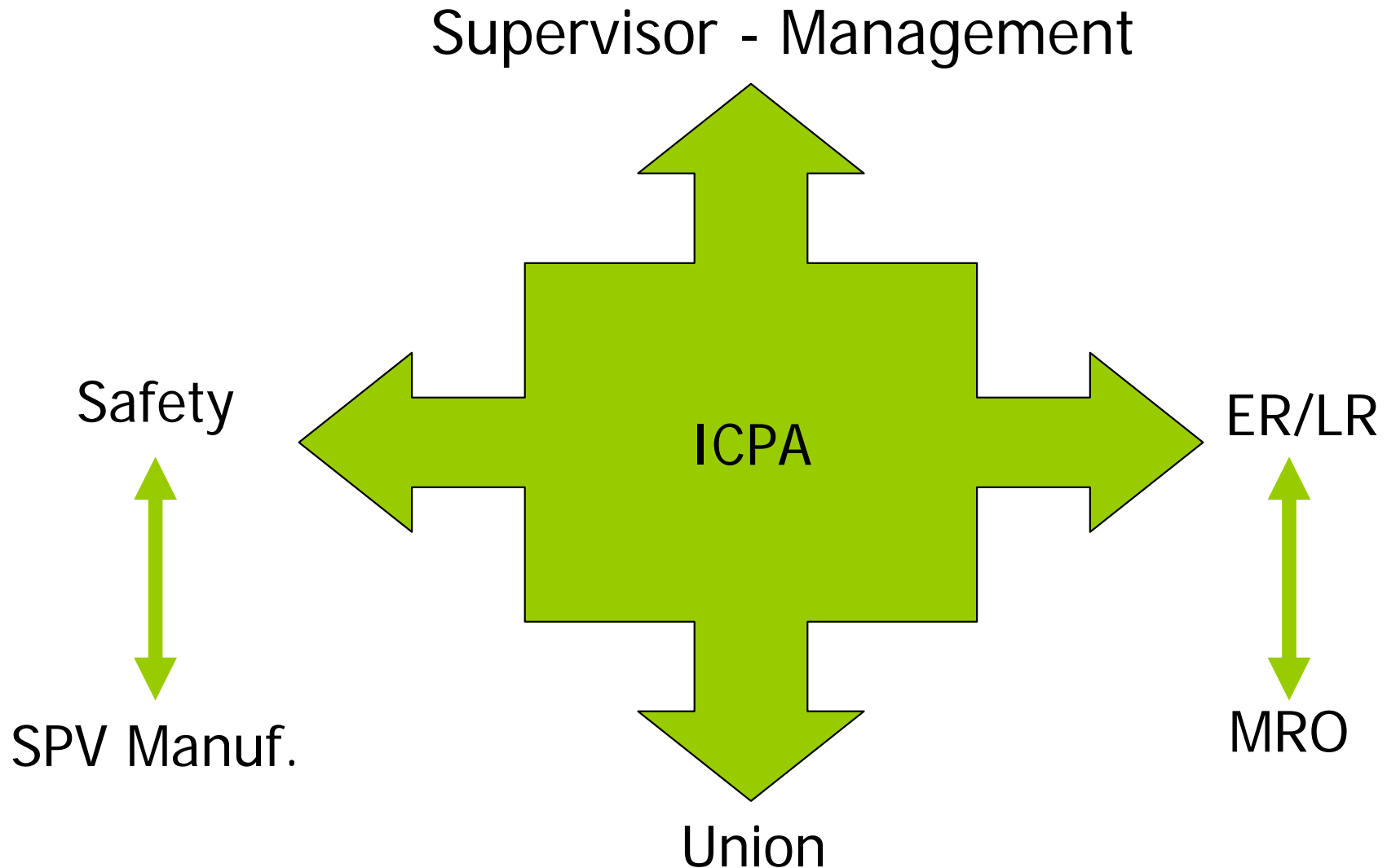
- CA- 1 Transmitted via EDI (immediately upon receipt)
- Hard copy to OWCP (after all documents are collected)
 - CA-1
 - Controvesion Letter
 - Witness Statements
 - Medical Documentation
 - MRO results
 - Copy of LCA

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Employee Relations

- Withholds affecting decision until OWCP final adjudication
- Confers with Supervisor and ICPA
- Confers with Union
- Confers with MRO
- Advises supervisor

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Witness Statements

Supervisor:

- Indicates that employee called him on Saturday, Jan 8 stating he was positive for drugs and asking should he report to work on Monday Jan 10 – employee was told to report.
- Admin Asst: Employee contacted Admin Asst. requesting sick leave on Jan 11. Tells Admin Asst he had an “accident” on Monday. Admin asked employee if this has anything to do with call he made to supervisor on Saturday – employee says “he already has that covered.”

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Witness Statements:

Manufacturer:

- Safety Officer for manufacturer of SPV states vehicle maximum braking force is .18 Gs of force
- Braking will not occur unless applied by operator and not with sufficient force to eject operator
- Vehicle had 43,800+ hours of operation time without any reported accident of any type

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Witness Statements

Medical Review Office:

- Records indicate phone calls were placed to employee to give employee opportunity to dispute findings or to provide a reason(s) why he tested positive for cocaine.
- Same process was used to contact employee the first time he tested positive
- Employee did not answer or return calls from MRO, yet informed Supervisor Saturday he was positive for drug use.

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Pulling the Pieces Together

Basic test for coverage is, did a incident arise out and occur in the course of employment.

- Did event occur?
- Facts of Injury
- Timing
- Medical
- Other Red Flags

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Agency's Position in this Case:

- Probable cause to doubt fact of injury.
- Insufficient Medical Documentation (medical does not state that an injury was sustained as a result of a factor of employment.)
- Statement of witnesses (led agency to believe incident was staged.)
- Mechanism of Injury (highly improbable the vehicle could brake with the force to propel someone.)

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OWCP Adjudication

*“Evidence submitted is insufficient to support that the event(s) occurred as alleged” – **Denied based on Fact of Injury Test.***

- Employee did not establish by weight of reliable, probative, and substantive evidence the occurrence of an injury resulted in a specific event - that is that an injury occurred at the time, place and manner alleged.

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OWCP Adjudication

- All COP charged to leave or declared an overpayment
- Medical treatment not authorized and prior authorization terminated
- Employee can request reconsideration or a hearing
- Employee has opportunity to provide additional evidence (employee submitted written statement of what happened and two doctors statements.)

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Lessons Learned:

- Key player is the Supervisor
- Training provided to Supervisor can be critical
- Communication between entities may be essential
- Cooperation on all levels is paramount
- Collaboration with entities outside the organization (e.g. MRO) may be necessary
- ICPA may not be aware of extenuating circumstances involved in a claim

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Areas of Common Interest
for ER & WC

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- Claims Involving Intoxication Impairment
 - The possible involvement of intoxication or drug-related impairment in a job-related injury immediately raises the question of disciplinary action and it is one of the statutory exclusions to workers' compensation under the FECA. Immediate documentation is essential.

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Best Practices

- Record must establish both the extent to which the employee was intoxicated and the particular manner in which the intoxication caused the injury.
- Level of evidence of intoxication need not reach judicial legal standards in order to be actionable or to pose a bar to FECA coverage.
- Administrative standard - means that the use, and, in fact, sometimes the mere presence, of alcohol or other intoxicants were involved in whatever infraction or injury occurred

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Sharing Information

- Did the Agency breach a settlement agreement by disclosing removal-related documents to OWCP?
 - 2009 MSPB 238
- Who is the custodian of the appellant's workers' compensation claim file?
 - ECAB Docket 09-0913 S.C. and the Nevada National Guard

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- The Code of Federal Regulations (20 CFR 10.11), most recently revised on 11-25-98 at 63 FR 65306, reads as follows:

"§ 10.11 Who maintains custody and control of FECA records? All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT-1 (Office of Workers' Compensation Programs, Federal Employees' Compensation Act File)."

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FECA CIRCULAR NO. 09 – 05
August 26, 2009

"The Office of Workers' Compensation Programs (OWCP) has determined that records covered by DOL/GOVT-1 may not be used in connection with a personnel action absent consent of the subject of the record."

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Other Recent Decisions

- ECAB Docket # 09-1066 The case of T.L. and the National Security Agency, Fort Meade, MD – removal for misconduct
- ECAB Docket # 09-982 The case of J.J. and the Bureau of Prisons, Fairton, NJ – willful misconduct
- MSPB Docket # SF-0353-09-0650-I-1 - restoration case

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- ECAB Docket 09-1004 The case of A.S. and the Portsmouth Naval Medical Center – stress in response to investigation
- ECAB Docket 08-2510 M.A. and the Postal Service – workplace altercation
- MSPB Docket SF-0353-09-0650-I-1 - restoration case

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